

**RE B (LEAVE TO REMOVE)  
[2006] EWHC 1783 (Fam)**

Family Division

Sumner J

19 July 2006

*Removal from jurisdiction – Effect of refusal on mother – Least damaging option for child – Whether relocation could enhance father’s relationship with child*

The homosexual father was brought up in the UK and the lesbian mother held both UK and US passports. The mother’s partner was the father’s sister and when she and the mother decided they wanted a baby together, the father agreed to act as a sperm donor for the purposes of impregnating the mother. There was disagreement between the three as to the future role of the father with the baby. The mother stated that he had agreed to act as an uncle but the father claimed that they all intended to take an equal parental role. Since the child’s birth in 2002 the father’s only contact with him had been by court order and numerous acrimonious incidents occurred: on one occasion the mother took the child to the USA in defiance of a court order and, on another, the father was charged with sexual abuse of the child on the basis of the mother’s accusations. The child was made a ward of court although had since been de-warded and the father had been granted parental responsibility. Subsequent to a finding that the father did not pose a risk to the child and the mother undertaking not to repeat allegations of sexual abuse, contact between the father and child resumed successfully. The mother claimed that she had changed in her attitude towards the father and the experts involved were unanimous in their view that the child should remain with the mother and that leave to remove should be given. The mother (who had been in receipt of public funds from an early stage) applied for permission to take the child to live permanently in the USA while offering the father contact in that country. She argued that she had been offered a good position in the film world, her former career, and that she was needed to look after her own mother who lived in Miami and was in poor health. The father, acting in person because he had exhausted his financial resources, now applied for a sole or joint residence order, arguing that only if the child remained in the UK could the advantages of his regular contact with the child be promoted.

**Held** – granting a conditional permission to the mother to remove the child from the jurisdiction –

(1) Serious concerns were required in order to warrant changing the primary carer of a child. On the basis of all the reports there were no concerns about the mother’s day-to-day care and she had come to accept the value of contact and the father’s role in the child’s life. Although the father had shown great commitment and determination in relation to the child, he was still emotionally embittered and had not moved on to the same extent as the mother. There was thus no proper basis on which the child’s best interests would be served by a change of residence from the mother to the father (see paras [161], [162], [167], [168], [170]).

(2) The prospect of shared residence working when there was lasting conflict between the parties was very low. The view of the experts that the conflict between the parties also prevented or substantially reduced the prospect of a developing role for the father should the mother and child remain in the UK was so well founded that it was ultimately decisive (see paras [170], [173]).

(3) In line with the consideration of genuineness and its two part test of motivation and practicality, as set out in *Payne v Payne* [2001] EWCA Civ 166, the mother’s enhanced employment prospects in the USA and the poor health of her own mother were major motivating factors in her desire to relocate. The impact on the mother, were

she unable to go, would be dramatic, long lasting, genuine and deeply felt, and would affect her care of the child. In terms of practicalities, if the mother were unable to go the intensity of the conflict would remain and be increasingly damaging for the child. Continuation of the present conflict between the parties would, in the opinion of the experts, cause increasing emotional and psychological harm for the child. The short-term upset for the child in seeing less of the father was heavily outweighed by the prospects for the future with his mother in employment and in the substantial reduction in acrimony (see paras [173]–[175], [184], [197]).

(4) Because there was almost no prospect of an absence of conflict between the parties, the mother's proposals for the father to have contact in the USA represented the best chance for the father because it would be the least damaging option for the child. Relocation would greatly reduce the pressure on the mother and thus provide real hope for his valuable relationship with the child (see para [193], [196]).

#### Cases referred to in judgment

*Airey v Ireland (No 1)* (Application No 6289/73) (1979-80) 2 EHRR 305, ECHR  
*C (Permission to Remove from Jurisdiction), Re* [2003] EWHC 596 (Fam), [2003] 1 FLR 1066, FD  
*P, C and S v United Kingdom* (Application No 56547/00) (2002) 35 EHRR 31, [2002] 2 FLR 631, ECHR  
*Payne v Payne* [2001] EWCA Civ 166, [2001] Fam 473, [2001] 2 WLR 1826, [2001] 1 FLR 1052, [2001] UKHRR 484, CA

*Mr A* acting in person

*Joanna Dodson QC* and *Dermot Main Thompson* for the first respondent

*Monica Ford* for the second respondent

*Cur adv vult*

#### SUMNER J:

##### *Introduction*

[1] There are two applications before me. They concern P who is 4 years old. He was born in May 2002. The first application is by his father, Mr A, of 30 May 2005, for a sole or joint residence order. The second is by his mother, Ms B, of 21 December 2005, for permission to take P to live permanently with her in the USA. Her intention to make this application had been set out earlier in a statement filed in March 2005.

[2] I heard evidence and submissions over 8 days finishing on Friday, 23 June. It was a long and difficult hearing. The background is highly unusual. There have been dramatic events in the history of both parties leading to an exceptional degree of degree of acrimony between them. The consequence of the court decision is highly charged for each of them.

[3] Given the degree of emotion and the need for further urgent work to be done if I approved the mother's application, I announced that I was considering giving an immediate decision. This was only if I was sufficiently confident to do so, with judgment to follow. The parties accepted this course. Having considered the matter with great care, I announced my decision. It was to permit the mother to take P to the USA. For reasons to which I shall come it was a conditional permission. I now set out the reasons for that decision.

*The parties*

[4] The father is 43 years old. He is a health specialist and runs a diploma course at his school in London, where he also has a clinic. He was brought up in the UK and lives in his own three bedroomed home in north London. He is homosexual. The birth of P was preceded by the ending of a long-term relationship with a partner called P. The father is now in a long-term relationship with another partner, LJ, presently working at Harvard University but likely to return to live in England shortly.

[5] The mother is 44 years old. She was brought up for her first 5 years in the UK and USA. Her father was an entertainer, working mainly in the USA where her mother now lives. After the age of 5, she completed her education in the UK going to New York when she was 17. She studied graphic design and worked there in art, photography and fashion styling. She has an American and a British passport. She returned to the UK in 1983, attending the London International Film School, having already worked as a runner on several feature films. She worked on pop production promotions for a series of production companies, before becoming a TV director in 1994. From then until 2000 she produced and directed a number of programmes, the majority being filmed in the US.

*Outline history*

[6] The mother met the father's sister L in 1989. They entered into a long-term lesbian relationship. L, who is now 45 years old, was an advertising director at the time. They set up home together, latterly in North London a few minutes from the father's home. In 1994 L started a specialist school and went into business with her brother.

[7] In due course, the mother and L decided they would parent a baby. The father had earlier offered to be a donor. At a meeting in February 2001 between the three of them it was agreed that he would provide sperm for the mother to impregnate herself. This is what happened. From June, the mother also used the sperm of other donors. In August 2001 she became pregnant. The father was told but not about the other donors.

[8] The mother says that after a scan in December 2001, for which the father paid, his attitude changed. They had all agreed that he would be an uncle to the child which they would parent. He was now saying that his sister was going to be an auntie, and he would be the dad. It was the first time the mother says that he declared that he was going to have a parental role. The father says that it was always intended that the three of them would play an equal role in decision making.

[9] The failure to have a clear and agreed plan about the father's part in the infant's life has proved disastrous. It has led to years of bitter acrimony with allegations and counter allegations; since March 2003 this has been within the present proceedings. I shall not try and resolve the rights and wrongs of all the subsequent disputes. The turmoil since late 2001 that led to these proceedings has included over 20 court appearances, and the termination of each of the parent's prior relationships. In the case of the mother and L, the mother blames the father for the ending of that relationship.

[10] It has involved the mother going to the USA with P, once after she accused the father of sexually abusing him, a second time in defiance of a court order when the father started proceedings. The father has twice faced

charges of sexual abuse. Once it was on the mother's accusations with the result that the father spent a week in prison on remand. He has been arrested twice. His contact with P was only obtained by court order and expanded as a result of continuing proceedings. The mother has believed until recently that the father had sexually abused P and was a danger to him.

[11] Handovers have been fraught with the mother not speaking to the father and accusing him of threatening her. The father as recently as last August involved social services when he thought bruising to P had been caused by the mother and L. The difficulties between the parties have been further exacerbated because the mother has been in receipt of public funding from an early stage. Her right to this has been challenged by the father not least because he is ineligible. He has spent some £180,000 on legal costs, exhausting his available resources.

*Lack of representation for the father*

[12] It has been a particularly unfortunate aspect of the case that the father, having only obtained contact to P as a result of real commitment and at great legal expense, faced the final hearing unrepresented. The mother was represented by Miss Dodson QC and Mr Main Thompson. Miss Ford appeared for the guardian. I drew attention to this at a Directions Hearing. Efforts were made to remedy this without success. Though the father had the assistance of a Mackenzie friend this situation has been troubling.

[13] I have looked at *Airey v Ireland (No 1)* (1979-80) 2 EHRR 305 and *P, C and S v United Kingdom* (2002) 35 EHRR 31, [2002] 2 FLR 631. I had considered with some anxiety whether the father could present his case properly and effectively conduct it. He made no request for an adjournment and was seemingly content to present his own case, for which he had prepared carefully. I endeavoured to ensure that all relevant questions were put to witnesses. Whilst this is not the same as being represented, I believe a fair and effective trial was achieved. It is both a highly emotive and important case, but the father has been thorough and able to put his case effectively. Representation would not have altered how his case was presented.

[14] Given that background, it is not surprising that it has been a tense hearing. Each party has in difficult circumstances conducted themselves with civility to the court and a greater degree of civility to each other than I had expected.

[15] I return to the history. What follows represents my findings, unless the context otherwise allows. I shall not, as I have said, resolve all the issues between the parties. But, as will appear and is accepted, it is the degree of acrimony between the father and mother for which each have a responsibility, which is one of the most important factors in this hearing. Dr Berelowitz, a child psychiatrist, and the guardian have placed particular emphasis on this. I have already outlined sufficient to make that outcome no surprise.

*The history*

[16] From December 2001 the mother's case, which the father accepts, is that L felt excluded. That caused difficulties. The mother believes the father was jealous of L. This may well have been true. I am satisfied that the father in his new found role sought to assert himself. Faced with opposition from the

mother who never thought that he was going to seek a parental role, he faced a difficult situation. By nature an emotional man, he did not react well.

[17] As a result, the father was rightly seen on occasions as aggressive, threatening and persistent, although he strove to be reasonable, as he was at times. The mother saw it understandably as an attack on her and L as parents and an attempt to end her relationship with L about which he was clearly warned. It was certainly a factor in that, as the mother says that her relationship with L finished in September 2003.

[18] L attempted suicide on one occasion. The mother blames the father both for the separation and L's attempt on her life. The father denies that he attempted to split the mother and his sister. They are still living in the same flat in north London, and he believes that their relationship continues. What is clear is that if the mother moves to the USA with P, L does not have any visa which would permit her to go. She may well only be able to stay as a visitor.

[19] Tracing the exact history between the parties after December 2001 has not been easy because of the differing accounts. There were a number of emails between them at the time. They give some flavour of the difficulties that soon arose and the effect on the parties.

[20] In February 2002, the mother sent a message to the father after an argument in which she considered the father had threatened her. She pointed out that although the father had an involvement with the child yet to be born, she and L would be the parents. In April 2002, L wrote to the father pointing out that he had agreed to take an uncle's role. His action and behaviour were destroying her relationship.

[21] When P was born on the 13 of May 2002, the father paid hospital fees of over £4,000 and says that he gave a sum of £25,000 by two cheques to the mother. The mother accepts that he did make a payment to the hospital. She denies that this was what had been intended as I accept. In relation to the sum of £25,000 she says the money went to L. It was, I find, in recognition of her part in a successful property venture by the father.

[22] P returned home with the mother and L. There were visits by the father. They were regular at the beginning but the pattern thereafter becomes unclear. In June 2002 the father agreed to take the role of an uncle, if the mother and L removed a picture they had up of his former partner. In July there was an angry message by the father to L. In her reply L spoke truthfully of father's constant threats and the serious effect it was having on her.

[23] On the 13 September there was a confrontation between the mother and father which had profound repercussions. The mother accused the father of bouncing P up and down on his lap for sexual gratification. It related to an incident on 15 August. This itself was shortly after an earlier incident, when the mother believed that the father had rubbed P's penis with Vaseline with such force as to cause blisters. On seeing the father's behaviour on the second occasion, the mother said she was physically sick.

[24] The father reacted to this allegation, which he said was entirely false, with great anger. The mother reported the incident to the police that day. They passed the information on to Camden Social Services. There was an investigation. At the wish of the mother, the father was not involved.

[25] Three days later and following the confrontation, the mother took P to stay with her mother in Miami. She did not return until the end of October, interrupting contact for the father. It led to the father complaining that he had only seen P once in 3 months.

[26] In December 2002 there were two telephone conversations between the father and the mother which the father recorded. There are transcripts. They make somewhat strange reading; they are inconclusive. The mother alleges that they have been tampered with; the father says that this has not happened. There has been no investigation of this. I accept that the tapes had been accurately transcribed. If the father is correct that they are genuine as I think likely, they are illustrative of the parents' attitude at that time.

*The telephone transcripts*

[27] The mother said that it was not nice to be threatened with all sorts of things. The father complained of being falsely accused of abusing P. The response was that if there were no more threats the relationship could progress. The father had threatened to change the locks and walk out on L's business. Everything would be normal if the father did not threaten her and L's business. She was repeatedly asked to withdraw the allegations against him which was not directly answered. She would not say that they were untrue. The father said that he had to go and see the police. The mother said that all she had said was that he had threatened her and she had threatened him.

[28] Social workers had been around for an assessment; she had told them not to visit him. The father said he would not live with the threat of something he had not done; the mother said that she was not going to live with threats of court proceedings. She would not say whether she had a supply of the father's sperm in the freezer which the father said she was threatening to use against him. She made it clear that if he served a bit of paper up on her he would not see either her or P again. She could not take anymore.

[29] In the second conversation on the 11 December 2002 the mother said that she did not want to continue talking to him. She would not consider the father visiting one morning a week. She was upset by him saying that he owned half of P, and that he was going to go to court. He needed to stay away, because it would split her and L. She repeated that if he took her to court he would not see P again. She was not going to have him anywhere near her. The father said that he had not done anything; this was disputed. It was not a false rape claim. He did not realise how his aggression felt.

[30] She added that they had made a big mistake, not in having P, but not spending more time talking about it beforehand. One of the sad aspects of the case is that the father has not seen how right this is. The father was not a bad person, and they would leave him alone if he left them alone. She could not take it any more; she could not deal with him.

[31] I draw the following conclusions. The father was determined to persuade the mother to withdraw the abuse allegations against him and to say whether she still had his sperm. The mother would be drawn very little on this save to say that the allegations were not untrue.

[32] The father was aware as a result of these conversations and prior messages that his behaviour was seen by the mother and separately by L as aggressive and threatening. The mother could not cope with him. She made threats to remove P if the father went to court. She wanted to save her

relationship with L. They should each leave the other alone. Whether this was the right solution the father failed to understand the effect of his behaviour.

*January 2003 – May 2004*

[33] In an email in January 2003, the mother took the father to task about his conduct. She did not know how he could change if he did not see that his conduct had been aggressive and abusive during her pregnancy and since. There was to be no more 'my son is' and 'daddy'. Taking a father's role was not possible. He could come up on one day a fortnight if there were no upsets. In February she rejected the idea of taking P to the father but he could come with his mother which the father wished to take up.

[34] In the meantime the father became aware that a total sum of \$250,000 had been sent by the mother and L to Miami in December 2002 and January 2003. Given that and the mother's threat that he would not see P and her again if he served any documents, the father applied without notice on 5 March 2003 for P to be made a ward of court. He sought injunctive relief to prevent the mother taking P out of the jurisdiction. It led to six court appearances within one month before five different High Court judges.

[35] In his affidavit in support, the father recounted a brief outline of the history. He mentioned the events of the 13 September 2002 and the mother's subsequent departure for Miami. He recorded the mother's anger when he put 'Daddy' in his Christmas card to P, and his suspicions about the money that had gone to the USA in December and January. Finally, he mentioned her threat to take P abroad if she was served with papers.

[36] A passport order was made, P became a ward of court, and the mother was forbidden to take P from her address. The father was granted parental responsibility and a return date of 12 March 2003 was given. The passport order was served on the mother at 9:30 pm on 7 March. The timing was not the father's wish; he subsequently agreed that this must have been very upsetting for the mother.

[37] On 7 March the father applied for an officer at the US embassy to say whether the mother and P had American passports as well as British ones which had been surrendered. It transpired that they did. Using them and on the same day the mother and P left for Los Angeles in breach of the order that had been served on her. L was seen by the tipstaff; she said she did not know where the mother and P were. She was arrested. She came before Bennett J on 10 March, when she was cross-examined at some length.

[38] She said she was unaware that the mother also had an American passport. She agreed about the transfer of money to Miami. She did not know where the mother was and she had not been in contact. She agreed to search for further documents.

[39] She came back before Kirkwood J on 13 March when she was further cross-examined. She was represented and tried unsuccessfully to be removed from the proceedings. She also appeared subsequently before Bracewell J. She said that she had not heard from the mother. The flat was in the mother's name and she had made a small financial contribution to it. She confirmed that the mother knew that P was not to be removed from their home.

[40] A charging order was made on both the US and the North London properties on 26 March 2003. The mother returned to the UK with P at the end of April. Subsequently P was de-warded and the charge on the Miami flat

was lifted. I am now satisfied that the mother has no financial interest in that property. The proceedings were upsetting for L who had tried to help each of the parents.

[41] The mother accepted in evidence that she could not make excuses for her conduct in taking P to the USA in breach of a court order which she regretted. It was out of character. She was however very vulnerable and very affected at the time. It remains an important factor in relation to the mother's application to relocate.

[42] On 21 May 2003, the mother made a detailed statement to the police running to 16 pages. It set out the circumstances which had so alarmed the mother in August 2002. As a result, the father was arrested and held on remand for a week. He subsequently faced four charges, one of assault on the mother, the second was assault on a friend, and two charges of harassing the mother and L. On his release the father was bailed on terms that prevented him from returning to his home for 6 weeks. When the matter came to trial a year later the Crown Prosecution Service offered no evidence against the father. He was bound over to keep the peace. It was a traumatic episode for the father.

[43] In June 2003, DNA tests were ordered because the mother said she had used the sperm from more than one donor. The results showed Mr A as the father. There was a hearing before Wall J in July 2003 about service of prosecution on the mother. I mention the hearing because both parties were represented by leading counsel. It shows how matters were escalating.

[44] In October 2003, the father sought a penal notice to be attached to an earlier order for the mother to file a statement. The mother relies upon this as showing the father's attitude to her. She was out of time but he knew why. He had attempted to have her public funding withdrawn. It had been suspended and the investigations that resulted made compliance very difficult. It shows the unnecessary lengths to which the father would go and his adverse view of the mother.

[45] There was a hearing before me for 3 days in November 2003. A report was available from Dr Berelowitz. The mother had repeated allegations to him that the father had abused P and other children. She had recently split up from L, who had attempted suicide. She considered contact between P and his father as intolerable.

[46] Dr Berelowitz commented that both parties had gone into their arrangements with too little preparation in a case of great psychological complexity. The father should have a relationship with P equivalent to divorced parents, unless he was a real threat to the mother or P by harassing her or because he was a paedophile.

[47] The guardian, Mrs Bruce had also reported. The mother had told her that she believed the father would molest P in the future. She was not safe in the UK, and might be safer in the USA. She was strongly against contact and would be prepared to go to prison to protect P. The guardian warned that if the ongoing conflict could not be reduced it would be likely to cause P emotional distress as he grew up. The mother would find compliance with the contact order very difficult even if there were no risk to P.

[48] The hearing resulted in a consent order after much negotiation outside court. There was to be contact supervised by an independent social worker, Miss Hall. The matter was to come back before me in March 2004.

[49] When it did Miss Hall had reported. She had seen both the father and mother before contact started. The mother had asked her repeatedly how she could let a paedophile have contact with her son. There was supervised contact in December 2003 and January 2004. It was the first contact by the father for 13 months. There had been a further three by the time of the hearing in March 2004. They had gone well. Miss Hall recommended a report from an expert in the field of child sexual abuse and mentioned a psychologist, Mr Ray Wyre.

[50] The guardian said the mother found contact intolerable. P had shown disturbed behaviour afterwards. She would find it impossible to see the father as a dad; she considered him bad, dangerous and malicious. She saw no prospect of conflict between her and the father reducing. The guardian repeated her concern over the continuing conflict, but noted that contact had successfully allowed P to know his father. Directions were made for Mr Wyre to be instructed with a final hearing in July 2004. There was to be contact every 3 weeks.

[51] Mr Wyre reported after interviewing the father. He considered the father posed no risk to P in the past or the future in relation to sexual abuse. In June 2004 Miss Hall recommended contact more frequently than 3-weekly. Dr Berelowitz at the same time recommended regular and unsupervised contact with the father.

[52] He was very worried by the mother's view of the father as a paedophile. P needed to be free to develop his relationship with his father. The guardian considered the mother had shown herself well able to meet P's physical and educational needs. She recommended that contact be increased from 3 to 4 hours a fortnight.

[53] At the hearing on 20 July before me both parties were represented by leading counsel. They reached the following terms which are important.

‘And upon being recorded that in the opinion of Mr Ray Wyre, [the father] has not in the past posed and does not now or in the future pose any risk to P, and [the mother] accepts that there is no cogent evidence, which will lead to the court finding that P has been sexually abused,

And upon [the mother] undertaking by her counsel not to repeat the allegations which the mother has made of sexual abuse by (the father), either to P or any other person ..... ‘

Contact was to increase from 3 to 5 hours a fortnight and a review hearing was fixed for December.

[54] When the guardian saw the mother for her report in December 2004, she accepted that P seemed to enjoy contact. However the mother was concerned about the father's attitude to her at contact which she found rude, aggressive and physically intrusive. There was the effect that this would have on P.

[55] In March 2005, the mother set out her reasons for wishing to take P permanently to Santa Fe, New Mexico. There was an offer of employment there and her mother who lived in Miami had deteriorating health. She had contacts there including P's godmother. She set out the practical details of how she proposed to live there. It would be staying with her good friend to

start and then she would then rent a property before buying. She gave details of her employment with a salary of US\$65,000 a year.

[56] However, also in March 2005 the manager of P's nursery school reported to social services that he had made disclosures. His father was not nice, and had touched his 'pp'. The father when seen by social services felt that P had been coached by the mother. The mother considered Mr Wyre's report extremely biased. She said P was returning from contact verbalising and displaying inappropriate sexualised behaviour. She did not raise complaints herself but had prepared notes of 15 contact sessions between November 2004 and March 2005. The mother took care to say that she was not making allegations against the father. She was noting what P had said on occasions after contact.

[57] The notes included P saying that he played naked with the father, learning that his mother was bad, saying that his daddy played with his 'pp', daddy had a dragon in his trousers, daddy big 'pp' stuck up like this, and that daddy told him to hit mummy. The father saw in the allegations and the mother's notes his worst fears arising from the second time, namely the allegations of sexual abuse by him on P. This was understandable. But the level of distrust led him to believe that the mother had coached P.

[58] As a result of the allegations P had been physically examined by a doctor. In evidence the mother pointed out that this was not her wish. She was asked to agree and her solicitors recommended that she co-operated. Her acceptance of this cannot be criticised. Contact was suspended.

[59] Social services investigated and reported in May 2005. P appeared comfortable and relaxed with both parents. All recorded contact with each parent had been extremely positive. He had an extremely strong attachment towards his father appearing to thoroughly enjoy the time they spent together. Their conclusion was that unsupervised contact to the father should be reinstated. This took place.

[60] As a result of his further arrest and the false allegation of sexual abuse, the father made his application on 17 May 2005 for a residence order. His fear was that P might be coached to say horrendous things about him. Unless the mother could positively endorse his relationship with his son, he wanted the court to consider a shared residence order or sole residence to him.

[61] The stage had been reached when both parents were recording what happened at handovers. The father brought someone with him and usually had a third person present during contact at his home in case of further allegations. In a message to the mother he asked her to put aside differences for P's sake.

[62] Dr Berelowitz filed a further report in July 2005. The father spoke of his precautions. He was afraid the mother turned P against him. There were difficulties with L, because of what she was saying about their mother's history. He felt that the mother was determined to get him out of P's life. He mentioned again that she had retained some of his sperm so she could make false allegations against him.

[63] The mother pointed out that she had always wanted to take time off work when P was born. That had now been extended. The father would see him in New Mexico if the court considered it was in his best interests. She and the father did not speak.

[64] Dr Berelowitz considered that it continued to be an extremely difficult case. What P had said did not constitute specific allegations of abuse, but the

mother seemed to believe firmly that this had happened. The relationship between the parties was absolutely awful. He felt further allegations were inevitable. P was surrounded by parental discord, and further litigation was likely.

[65] The prospects of maintaining a relationship if P went to the USA were poor. There were other complications if the father was stopped seeing P; namely a risk that he would grow up, because of what the mother said, believing that the father had been an abuser.

[66] When the guardian visited P's nursery and reported in August 2005, the key worker spoke very positively about the mother's care and interaction with P. The guardian however noted no reduction in the mother's anxiety.

[67] Dr Berelowitz saw P in September 2005. He described him as a happy lively and engaging baby obviously very close to his mother. He noted that P believed his mother did not like his father and his father did not like his mother.

[68] The level of mistrust is further illustrated by an incident in July and August 2005. The mother told the guardian that she had noticed in late July that P had a lot of dark coloured bruises. She did not tell the father. Before she could take P to his doctor the father reported the bruises to social services, holding the mother and L responsible. Subsequently, a rare blood disorder was diagnosed as the cause.

[69] The questions arise why the mother did not tell the father of her concerns, and why the father did not raise the matter with the mother before involving social services. It is not isolated. There was an incident in May 2006 of P returning to his mother with either a 7cm scratch on his face and throat (per the mother) or a small scratch (per the father). The father saw no need to inform the mother what happened which related to his mother's dog. The mother did not complain because of concern over the father's reaction. These are indications of the deep mistrust, suspicion, and animosity which prevails between the parents. After 4 years there are no signs of it diminishing.

#### *The mother's evidence*

[70] The thrust of her evidence was that the relationship with the father had been very difficult because of his aggressive and threatening behaviour and its impact on her, leading to the ending of her relationship with L. She had no new partner, but she had been able to move on. She attributed this to using a friend to be responsible for the handovers of P to his father and being able to stand back. It was also listening to what Dr Berelowitz and the guardian had been saying. She acknowledged the importance of contact for P to his father. She did not wish to cut it off.

[71] Her wish to move to the USA was driven not by any attempt to interrupt the father's contact with P but because of her mother's declining health and the difficulties of obtaining employment in the UK. She had been to Santa Fe twice. Two close friends lived there. There was a good school for which she was prepared to pay the fees. Reasonable housing was affordable as was shown in the details which she produced. I consider her evidence under a series of headings.

*Employment in the UK and in the US*

[72] She had contacted all the old companies she had worked for. She had been in touch with every producer; she had emailed and written to numerous different companies. She had undertaken a recent wave by which she meant a blitz on possible employment prospects.

[73] She pointed out the difficulties. She had not worked for 4 years and therefore her CV was inevitably out of date. She could no longer take on projects which ran the risk on location of overrunning nor of working late because of the need to look after P. She was, as a result, regarded as having complications.

[74] It was an area of employment where word of mouth was most important but this had produced no results. She had made a great number of attempts to obtain employment but had had no offers. She was recalled to produce 35 pages of documents together with her own comments on the efforts to which she had gone to try and obtain employment here. Although there were some sent out in June 2006, the majority were older applications that she had made.

[75] The offer of employment in the USA was first made in January 2005. It has since been repeated. It is as Head of Developments at a production corporation. The head of the corporation is an ex vice president from Hollywood whom she describes as a very powerful lady. I have seen letters from her. Specific names have not been given by the mother. She feared that the father would so conduct himself in respect of her proposed employment that it would be in jeopardy.

[76] The salary is \$65,000 per year plus full medical benefits for her and P. Flexible hours were available which would enable the mother to work from home on 2 days a week.

[77] She accepted that she had other qualifications both as a teacher in adult education and as a health specialist. She said she would resent being forced into either of those employments. She saw her employment in Santa Fe as a unique opportunity to get back into her chosen profession and at a level comparable to what she had been doing before. She explained her success as representing the fact that she was probably one person in 20 applying for that particular post whereas in London it would be one in 2,000. Furthermore she had a European dimension to her work which turned out to be an added attraction.

*P's education*

[78] She had applied to Camden but been rejected for her first choice. She had then been offered another place. I gather that this was a possibility but she preferred a form of creative learning which would be better for P. She had selected the SFW School. It was fee paying but she could afford this. She had paid a deposit to secure P a place there beginning in September and produced a letter to that effect. It would be a detriment to him if, granted permission to go, he could not start in September and in addition she could have time to settle, formalise her employment contract and settle P in.

*Contact and cost of travel*

[79] The mother has offered staying contact in the UK with the father for one week in the summer and one week at either Christmas or Easter. In

addition she has offered 3 days contact every 5 weeks in the US. She considers that it would be possible to buy a flight to Los Angeles for £350 and internal flights would be under \$500. There is accommodation locally for between \$35 and \$80 a night.

[80] The father, who does not accept that the mother's application to relocate is genuine, says that he has a real fear of going to visit P in New Mexico. He would be framed for something he has not done either to P or to another child. He would not feel safe unless he went with a second person. This would obviously add considerably to the cost. The rates for transatlantic travel are at low season and they can go up to £700 or £800. Even if he were minded to go, travelling with someone else, he could not financially manage this more than 2 or 3 times a year.

*The effect on the mother if she was not to go*

[81] The mother describes the prospect of not being able to go to the USA as devastating, particularly because of her mother and given the continuing acrimonious relationship with the father. Furthermore she would be bitterly disappointed if she were not able to fulfil the career path which she started on when she returned here from the USA in 1985; she estimates that 80% of the filming thereafter was in fact done in the US.

*Threats and pressure from the father*

[82] In answer to his questions on this she set out what she regarded as his unacceptable behaviour. He took every opportunity to be physically obtrusive, twice brushing her breast with the back of his hand. She says that he had been threatening to her friend who helped with handovers; something which the father strenuously denied. She mentioned him snatching a robot from P so that he had a tantrum on his return.

[83] He had done subtle things to upset her and he wanted to cause her physical and emotional hardship, criticising her relationship with P. He had spat on the floor in front of her. He had deliberately tried to break up her relationship with L who had been caused great upset because of the father's jealousy. She had been made very fearful by his allegations from a very early time, fearing that she would be put out of the picture.

[84] These have not all been investigated. I am however satisfied that the father has not been able to control his feelings which have led him to act at times in a hostile way to the mother.

*Changes by the mother*

[85] His refusal to her going to the USA with P had not been helpful nor had he helped to mend the appalling last 4 years. She had altered in a great number of ways as appears from the reports and the fact that P had never missed a contact session. She needed to be very honest and she could not for instance agree to everything, like reading long letters from the father. She would agree to give undertakings or be subject to orders preventing her bringing up again past events and she would agree to mirror orders in New Mexico.

[86] Her views had changed from those she expressed to Miss Hall and the guardian earlier on. She now excepted the father had a role and calls him daddy to P. The guardian had helped her to see things differently and she

could see that if P was upset after contact, this could be reasonable. She accepts that she may have misread the incident which led to the confrontation on 13 September 2002. Over contact she may have misjudged things.

[87] She needed to change. She had to make sure that P could mention his father's name who did have an amiable side as well as a destructive side. She accepted that he must have good times in contact and she regretted describing the father as a paedophile. She contrasted her position with that of the father. She had stood back and been able to move on. He had provoked and escalated matters more recently. It was because she listened to the experts that she had agreed to staying contact starting. She had always taken their advice. She had slowly but surely come to her present position.

[88] It had taken her a long time to come to this position where she did not hate the father, although she hated the effects of the court proceedings on P. She had been a Buddhist for 25 years and she had forgiven him but she could not sit down and have a discussion with him. It was very damaging to revisit the past where very hurtful things had happened. She had not spoken in a negative way to P about his father.

#### *Housing in the US*

[89] The mother proposed to stay with her closest friend, LK, P's godmother, whom she had known for 25 years. She has moved from a large house in Santa Fe in the last year but still has sufficient space for P and her which in a letter she offered. She intends to rent a property when she is in employment. There is a greater prospect of being able to purchase a rented property than is normal here. She would wish to use her money from the flat and raise a mortgage to buy suitable accommodation.

[90] She said that she did not have many close friends in the UK, two of her closest had returned to the USA. She does have acquaintances amongst the parents at P's playschool. Apart from LK, there is also JC whom she has known for 5 years since they met in Santa Fe. He has written to say that he regards the mother as a close friend and had met them again in the UK in 2004. The mother said she would expect to see him about twice a week. She was confident that she would build up a greater network of friends.

#### *The maternal grandmother*

[91] She suffers from dementia; her health has deteriorated rapidly says the mother. She cannot continue to live alone in the future. She has insurance policies to cover the cost of assisted accommodation. Her brother works in Washington DC. Her mother would not wish her to move to Miami where she lives but she does have friends in New Mexico.

[92] Medical reports show that her mother, now some 77 years of age, has been suffering from progressive dementia. A report in April 2006 from her doctor stated that her mental deterioration resulted in her no longer being able to take care of her essential affairs such as feeding herself, taking medication correctly and essential trips to buy food. He emphasised the importance of the mother 'coming to Miami as soon as possible to help her failing mother'.

#### *New Mexico law*

[93] A letter from a family law firm in the State points out that, to achieve jurisdiction, there has to be full residency for a period of at least 6 months.

After that the court would have jurisdiction to address custody and enforcement matters. A custody order made from this court can be registered and enforced. By statute the courts recognise and enforce a registered child custody determination of another state as the UK would be regarded, which is immediate upon receipt of a physically certified copy of the order.

*The father's evidence*

[94] His detailed statement in April 2006 set out how much P means to him. He has a three bedroomed property which he shares with S, whom he describes as an adopted grandfather. He considered contact had gone exceptionally well and set out the excursions they had done both in London and at a good friend's home in Suffolk. He had never spoken ill of the mother but he was worried that P came out with comments showing the father in a poor light. He listed the ways in which he felt that the mother had tried to distance him from P, most of which I have recorded.

[95] He wanted to share parenting with the mother so that both parents played a real part in his life. He believed the mother could obtain employment here and considered that the prospects of his relationship with P continuing would be almost impossible in the USA. The mother had not thought out her plans sufficiently, former allegations of sexual abuse would be brought up and he would have to take a witness with him. He considered he would become a victim of the mother's campaign of malice against him. There was the distance, the cost and the serious impact on his and his family's relationship with P. It was so manifestly contrary to P's welfare that the mother should be prevented from going to the USA.

[96] The father started his evidence by a detailed denial of a series of allegations. He had not been abused himself, he had no attraction to children, he had not said words to the effect that he hoped that his sister's attempt at suicide would be successful and he had not presented any difficulties at contact with the mother's friend, M, who he described as a lovely man.

[97] He had never threatened or molested the mother and not touched her, he had not spoken rudely to M who was very good with P and he had never knowingly put P in danger. He accepted, on matters like the scratch, that poor communication meant that incidents could escalate into an issue. It was true both of him and the mother that because of litigation each became suspicious and looked for fault in the other parent.

[98] She was on balance an excellent mother providing all P's needs. His big fear was in relation to his emotional needs. He did not hate her.

[99] He considered they did have an agreement about the part that he was going to play and he accepted that he might have left L out, not punitively but thoughtlessly. He had not abused the mother nor molested her. He went into details of the efforts there had been to reach agreement.

[100] He agreed that on 13 September 2002 he had foolishly waited outside the restaurant. He had been completely shocked about the allegation and had raised his voice. When the mother came back from America they had, in November 2002, had a meeting when they all decided to try and get on.

[101] He had taken advice on starting proceedings against the mother. He described how very upset his sister had become over that. It was followed by the humiliating process when the police arrested him on 23 May 2003,

removing a great deal of material from his home. He had spent 7 days in prison and was then not able to return to his home.

[102] He had listened to the mother giving evidence. He would like the mother and him to try and repair bridges and with his sister with whom he had not spoken for a year. He did feel that the mother had tutored P when he saw the detailed diary but nothing had happened for over a year. He still felt that allegations could surface again. There was more protection here. The best position for P was to have a few days a week with his dad. It was the last chance for them to be amicable and for P to see them together. He should have 2 homes with an equal amount of time in each.

[103] He had never run down the mother but he accepted that the relationship between the two of them was very poor. He will do everything in his power to do things better. He would never take P away from his mother.

[104] He earned about £25,000 a year before tax but hoped when more motivated that he might be able to earn £35,000. He had been described as very successful. At one stage he said that if the mother went away he would not see P if he came back to the UK but he added that he would be guided by expert evidence.

[105] He accepted with hindsight that reporting on P's bruising was very rash. He thought his new partner was coming back before the end of the year; if he visited him in the US and P was in New Mexico he accepted that P might not be satisfied by his explanation of why he had not visited.

#### *The father's witnesses*

[106] Mrs D, an impressive and deeply caring witness, lives in Suffolk. She has known the father for more than 20 years. She has 3 children between the ages of 8 and 14 who adore the father. She had seen a very loving relationship between P and his father.

[107] She had been aware of the difficulties during the pregnancy and had heard the mother refer to the father as uncle. She had been shocked by a visit from the police asking about the father and whether he might have been grooming her children. Whilst the answer was obviously 'no' she had taken it seriously and asked each of them whether the father had ever acted in any inappropriate way. The answer was no.

[108] She had seen the mother walk up with P and push the pushchair towards the father with no goodbye and nothing said. It had upset her children. The mother's explanation was that she had said her goodbyes out of sight beforehand.

[109] She regarded the father as one of her best friends who she actually thought was good. She thought that the mother did not want the father to see P often. She regarded him as a very caring and devoted father.

[110] Miss E, another impressive witness, has two children of 6 and 9. She has not known the father for so long. She had however worked on a self-employed basis for him for the last 3 years. She regarded him as a very good and trusting friend. Her children too adored the father who had never acted inappropriately at all.

[111] She had seen a very strong bond between P and his father and seen what she described as the absolute love and joy in P's eyes. She had seen the father be both what could be described as boisterous with P and also sit very quietly with him doing for instance a jigsaw puzzle.

[112] He also called his cousin, Ms B, who called the father her golden hearted cousin. She had seen him with P and their interaction was a normal father and son relationship but she described the father as a wonderful dad who was made for it. If P could not see him for long periods he would be damaged.

*Dr Berelowitz's report*

[113] When Dr Berelowitz saw the mother in May 2006 she said she supported continuing contact with the father but objected to joint residence which she thought unworkable. Things had moved on in the last 2 years and P had attended all his contacts. The father described a good relationship and activities between him and P.

[114] Dr Berelowitz had seen a tape of the mother handing over P. When the mother collected P she did not speak to the father. P was clearly having a good time with his father, the play being somewhat excitable and manic; 'there is no suggestion that P feels anything about his father except affection, and there are no suggestions that he is afraid of him. ... he uses his father appropriately as an attachment figure'. During the interview the mother referred to the father as [Mr A] throughout. A friend of hers now facilitated handovers.

[115] P told Dr Berelowitz that he liked to see daddy. He did not think that his parents knew each other. Mummy said to him that daddy hurts mummy; he did not know how; neither had hurt him. He was quite concerned that his parents were not friends.

[116] The mother said that P did not talk about the relationship with his father. It was hard for her to judge their relationship. There had been a couple of occasions when she has been asked to take P home from nursery after contact and he has been withdrawn, not wanting to play. P knew that she does not like the father but that does not explain it all.

[117] Having someone to do the handover has enabled her to move on. P had attended every contact; her actions spoke for themselves. She had tried hard to move on for P's sake. She wanted an end to court proceedings.

[118] She could not say whether it was really in P's interest to see his father, she had to rely on the guardian and himself. She does not want to go into the past. There were significant repercussions of her passing on comments about the father; she was reluctant to pass any on now. Dr Berelowitz was not confident that there were no allegations in her mind. She said she would stick to whatever agreement is made; she cannot say that her view of the father would never change.

[119] He saw very good contact between the father and P who was extremely comfortable and relaxed with him. The father said that the conflict will never cease; he wanted joint residence. He never said anything negative about the mother to P. He was worried that the mother would bring up all the sexual allegations in America. If P lived with him the mother would change her tune. Joint residence would be a positive influence. He believed the mother was plotting and scheming to get him out of P's life.

[120] Dr Berelowitz thought the mother was behaving differently but her underlying views had not changed. The animosity and suspicion persisted to a very high degree and he was confident that P was aware of this. He lived a compartmentalised existence in which two households had nothing to do with

each other, an inherently difficult situation for any child. He had told both parents that he did not think the present arrangements would be sustainable for P in the long run.

[121]

‘It is certainly unusual for all of the child’s key relationships to survive such extreme compartmentalisation over a great many years. So [P] is exposed both to discord and to compartmentalise.’

[122] There was no concern about the mother’s day to day care and he was unaware of major concerns about the quality of the bond in the relationship that P had with his father. He did not believe things could continue the way they were now. Exposure to discord between parents is very damaging to children and as things stand now P faced a lifetime of exposure to discord. Discord produced one kind of problem; amputating the relationship with his father created many others. It was unacceptable if P lost his father through denigration.

*Dr Berelowitz’s evidence.*

[123] He had been updated on the evidence the court had heard to date. He emphasised the importance psychologically to a child of discord between parents. ‘We know discord harms children’. Research showed that children do much better if their parents get on and that the quality of the relationship between the parents is paralleled by the relationship the child has with the absent parent.

[124] P now knows much more than he did and this will increase. ‘I am deeply troubled by the persistence of conflict and I cannot predict when it will end’. He did not see how handover could work with children of this age when the parents do not speak. On a child being in compartments, he equally did not see how a child could survive psychologically when he lives on one side of an iron curtain with each parent profoundly hostile to the other.

[125] He thought the mother would be devastated and with good reason if she did not go to the USA. He was troubled by an application where there had never been happy contact here. They cannot carry on as they are here.

[126] P does have a strong relationship with his father and it is not in his interests to amputate it. If this happened it removed one of his foundations and it is very hard to get going after 5 or 10 years absence.

[127] If P was in the UK twice a year it would only help him if the mother was able to say it would do so, and not see it as a chore or, worse, that the father was potentially dangerous. If she did, the quality of any such contact was very finely balanced.

[128] What the mother was offering in the US was a big step forward. If she adhered to her plans here and in the US and if it grew naturally over time ‘it may be better for P than what we are presently dealing with’. The thought of the father being ambushed in the USA is understandable. P needs his parents to work together. Reassurance from the mother by way of mirror orders etc should be sought.

[129] He did not consider a change of sole residence to the father as on. There would have to be very serious concerns about the mother’s care and only a solution here if the mother was committed to persuading P that he had

been sexually abused by his father. The whole history was bedevilled by the failure of each to work out the consequences of contact on the other; they have never been able to see it from the other parent's point of view.

[130] He understood the father being anxious to show that he was not just a sperm donor, the mother not agreeing to the minimum contact, then the father saying 'well lets go for 50-50'; he had some sympathy with that. 'He is fighting to be treated as a father with an ordinary father-child relationship. It would be in P's interest for the father to take up visiting in the US'.

[131] Relocation is the only way out of hostility. The mother does have an interest in things improving. Loss of a parent through denigration is more complex than loss of parent through death. It is wholly contrary to a long term view of the wellbeing of P to have denigrated parents. It is unimaginable to do this without the parents talking, and wrong to have staying contact if they cannot look at each other.

[132] He inclined to the hope that if the mother does go she can do the psychological work for P that she could not do in London. She cannot get on with her life here, which could be worse for her because her dismay and distrust would increase if she stays.

[133] The father said that if the mother is forced to do business she will; he thought the father was probably wrong. It is the atmosphere not the amount of time which research shows matter.

*The guardian's evidence*

[134] She had always been concerned about the level of conflict in the future seriously impacting on P. If mother has to stay there is no end to the conflict and years of litigation. The chance of a new life in US is a greater chance of stability for the future. The father is hopeful that if mother stays the relationship will improve but the guardian did not see that anything was likely to happen.

[135] She thought that a 50-50 split was unsettling. Most of her cases involved degrees of animosity but she put this case on a high level. The mother's proposals for contact are generous but they are a starting point – it is very difficult if the parties cannot greet each other.

[136] She thought the mother had P's best interests at heart. She believed that for him to see conflict is damaging and that to deny the father contact is very damaging. She does not regard the father as the best father. She did think the mother has begun to put P first, she has begun to move on, there has been a significant move of late. For P to stay here would be to leave him in a very bleak situation. She saw the main benefit of the litigation as drawing a line under legal proceedings.

[137] The father is so desperate to be a good father – desperation is perceived as not what was intended and it is perhaps naive for him to say that there is no hostility on his side. The father has also spoken to her and not pursued contact too far on her advice. Of late, the mother has referred to the father as dad.

[138] In answer to the father she agreed that she had not seen much contact between him and P because P has a happy time with him. She had a huge experience of seeing conflict and where it continues children are damaged. She completely understood the father's anxieties about going to the USA but damage was inevitable if he remained here and there is a chance for

improvement in the USA. No options were ideal; leave to remove is not ideal but the one least likely to damage P was if the mother goes.

[139] She did not believe that conflict was going to disappear. If the mother stays it will become more entrenched here. She thought the mother would find it very hard if she were forced to stay and find it very hard to rebuild her life here. She had been critical of the mother not moving forward. She was confident that she, the guardian, had made the right choice, not a huge amount of confidence, but she did know the effect of so much conflict. It is the conflict which is the most worrying thing. 'The father says he is not responsible for conflict, my belief is that it is both parents'.

*The law*

[140] In *Payne v Payne* [2001] EWCA Civ 166, [2001] Fam 473, [2001] 1 FLR 1052 Thorpe LJ said, at para [40]:

'To guard against the risk of too perfunctory an investigation resulting from too ready an assumption that the mother's proposals are necessarily compatible with the child's welfare I would suggest the following discipline as a prelude to conclusion:

- (a) Pose the question: is the mother's application genuine in the sense that it is not motivated by some selfish desire to exclude the father from the child's life. Then ask is the mother's application realistic, by which I mean founded on practical proposals both well researched and investigated? If the application fails either of these tests refusal will inevitably follow.
- (b) If however the application passes these tests then there must be a careful appraisal of the father's opposition: is it motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive? What would be the extent of the detriment to him and his future relationship with the child were the application granted? To what extent would that be offset by extension of the child's relationships with the maternal family and homeland?
- (c) What would be the impact on the mother, either as the single parent or as a new wife, of a refusal of her realistic proposal?
- (d) The outcome of the second and third appraisals must then be brought into an overriding review of the child's welfare as the paramount consideration, directed by the statutory checklist insofar as appropriate.

In suggesting such a discipline I would not wish to be thought to have diminished the importance that this court has consistently attached to the emotional and psychological well-being of the primary carer. In any evaluation of the welfare of the child as the paramount consideration great weight must be given to this factor.'

[141] The President, Dame Elizabeth Butler-Sloss, added, at para [85]:

'In summary I would suggest that the following considerations should be in the forefront of the mind of a judge trying one of these difficult cases. They are not and could not be exclusive of the other important matters which arise in the individual case to be decided. All the relevant factors need to be considered, including the points I make below, so far as they are relevant, and weighed in the balance. The points I make are obvious but in view of the arguments presented to us in this case, it may be worthwhile to repeat them.

- (a) The welfare of the child is always paramount.
- (b) There is no presumption created by section 13(1)(b) in favour of the applicant parent.
- (c) The reasonable proposals of the parent with a residence order wishing to live abroad carry great weight.
- (d) Consequently the proposals have to be scrutinised with care and the court needs to be satisfied that there is a genuine motivation for the move and not the intention to bring contact between the child and the other parent to an end.
- (e) The effect upon the applicant parent and the new family of the child of a refusal of leave is very important.
- (f) The effect upon the child of the denial of contact with the other parent and in some cases his family is very important.
- (g) The opportunity for continuing contact between the child and the parent left behind may be very significant.

All the above observations have been made on the premise that the question of residence is not a live issue.'

[142] In *Re C (Permission to Remove from Jurisdiction)* [2003] EWHC 596 (Fam), [2003] 1 FLR 1066, Charles J summarised the law as follows, at para [24]:

'What I take from this guidance and my approach in law in is that:

- (1) The welfare of these children is my paramount consideration. As in other cases where this is so I have to consider the short, medium and long term welfare of the children.
- (2) I therefore have to consider the facts and competing considerations in this case and should not decide it by reference to the class or sub class of case into which it could be said to fall .....
- (3) There is no presumption that if the applicant establishes that the proposal to move abroad is reasonable permission to do so will be granted.
- (4) The question whether the proposal of the applicant is reasonable has a number of aspects both when it is considered from the view point of the parent alone, or on a wider basis, and thus including the likely effect of the proposals on the welfare of the child.

- (5) Firstly to be reasonable the application must be (a) genuine and thus not motivated by an inappropriate selfish desire, and (b) practical. These are in effect conditions or hurdles the applicant has to show or cross to trigger the next stage of the assessment of whether the grant of the application would best promote the welfare of the child.
- (6) However there are wider aspects to the issue whether the applicant's proposal is reasonable which will vary from case to case and in my judgment will give rise to an assessment of the proposal from the viewpoints of the children and the adults involved.
- (7) ..... the guidance in *Payne* is not limited to directing the court to the factors to be taken into account but indicates the weight to be given (i) to various factors, and thus (ii) to the reasons for their relevance and importance in determining what will best promote the welfare of the relevant child in the circumstances of the case.
- (8) The reason for giving great weight to the reasonable proposal of an applicant who is the primary carer is the desirability of promoting happiness and stability in the home and the likely detrimental impact on the primary carer and thus the children if the proposal cannot be implemented .....
- (9) If the court concludes that a refusal of the application will be likely to have a detrimental impact on the care that the primary carer will give then the guidance in *Payne* indicates that that harm will *usually* outweigh the likelihood of harm flowing from other effects of the proposed move. This is based on a recognition of the importance of stability and happiness in the home.
- (10) In many cases the opposition to a move is based on the harm that it is alleged will be likely to flow from a reduction in contact with the non custodial parent. *Payne* indicates that *usually* the harm that is likely to flow from a reduction in contact will not found a conclusion that the welfare of the child would be best promoted by refusing an application by the primary or custodial parent to take the child abroad.
- (11) However *Payne* makes it clear that it is only giving guidance and that the competing considerations between a reasonable proposal for a move and a reasonable objection thereto must be carefully considered and weighed. This judgmental exercise will involve an assessment of the likely effect of the available possibilities and gives rise to issues of degree which have to be assessed having regard to the circumstances of the case. In particular the court will have to consider the manner in which the competing welfare factors apply in the case before it and thus, for example, the manner in which the reasons for promoting (a) stability in the home, and (b) contact apply in that case.

Further factors are likely to include the circumstances in which the child or children came to be living with one parent rather than the other, the ages of the children, their connection with the countries involved, and the ability of the family to maintain contact after a move.'

*The mother's case*

[143] Miss Dodson emphasised that the father should have generous contact with P. There was no evidence that he posed or would pose a risk to his son. The mother had progressed from trenchant opposition to anxious resigned submission and then to what is described as generous acknowledgement of the role to be played by the father in P's life. Reservations rightly remained but the mother did see that her anxiety should not deny P a full relationship with his father. It was accepted that there could be scepticism that, given the mother's history including the breach of court order, her motivation required close scrutiny.

[144] The mother had been able to see the severe toll on all the parties of 3 years of litigation. She did genuinely wish for a new chapter to begin and had with courage answered the father's many questions on the past. The sensitivity now shown by the mother was in contrast to the father. He was both inflexible, unrealistic, and resistant to advice.

[145] Far from being malicious the mother's application was genuine, including, as it did, not reduced but greater involvement of the father. As someone with both skill and intelligence, she had been fortunate to find employment which was both suitable and fulfilling. She can rehouse herself in far better quality of accommodation, she has a circle of friends, she has a school to which P can go and her mother is in poor health.

[146] It is a case where not only is the application realistic, but the mother's present position is dismal with no realistic prospect of employment nor of housing of the same quality as she presently has. The father had already had contact with P on several occasions in Miami without incident. Whilst it was accepted that his opposition is genuine, his view of the mother in the future was unfounded. Mirror orders could be effective and there is material to support this.

[147] If refused, the acrimony will continue and as Dr Berelowitz acknowledged, if she could not go the mother would be devastated. It would make an impact if the father did not go to visit P in the USA but there was no good reason why he should not do so. The effect on the mother would be very hard. As the guardian pointed out, if forced to stay here it would be very hard for her to find ways of rebuilding her life.

*The father's case*

[148] Whereas the mother considers that the father was motivated by jealousy of L, so the father considers that the mother was turned against him by listening to malicious remarks by his former partner, P. He points out that whilst she says she has moved on, in cross-examination she was making fresh allegations against him about, for instance, his behaviour towards M. Whilst some of his fears had been allayed he was not yet confident about visiting the US.

[149] It was a legitimate expectation to seek a shared parenting order. P was born in the UK. His roots are here. His father, paternal grandmother and adopted grandfather and an aunt with whom he lives are all here.

[150] The mother is going into the unknown. She has not lived there, has no fixed address and no secure job. He points to his good friends who gave evidence to the court and the bonds between them and P. The most emotionally damaging thing for P is to lose the bond he has with his father which would result from him going to the US with his mother; her aim is to cut him out of P's life.

[151] His confidence if the mother did go would not be in mirror orders but precautions to protect him. He has had to spend 4 years coping with vile accusations and what he wants most of all is a chance for him to stay in the UK. He could not see what life would be like without him.

*Submissions on behalf of the guardian*

[152] She had not made recommendations in her last report other than that P should reside with his mother. She had been in court throughout and listened to the evidence of the parties and Dr Berelowitz. Her recommendation was that the mother should have leave to take P permanently to the USA.

[153] The guardian's concern about the animosity between the parties was a theme through her reports. She noted Dr Berelowitz's comments that the present arrangements are not sustainable for P in the long-term – he was exposed to both discord and compartmentalisation and did not believe his parents knew each other.

[154] She highlighted the implications for P as seen by Dr Berelowitz if the animosity continued. First, the most powerful influence affecting a child's wellbeing was when there was discord between parents. They are much better to have a full and rich relationship with each parent. P was already aware of the issues and Dr Berelowitz's view was that this would increase in the future with continuing animosity which he could not predict would lessen.

[155] She shared Dr Berelowitz's view that shared care could not work when parents did not speak to each other. P could not survive psychologically living on either side of an iron curtain or Berlin wall.

[156] The guardian supported the mother's contention that she had moved on. She saw this in her acceptance of the explanation from experts about the sexual allegations in relation to the father, that the father had a role to play in P's life, that she now called the father daddy to P, and that she had kept to contact arrangements.

[157] In looking at the mother's proposals she had employment waiting for her in her chosen career. Her support network was far more extensive in the USA than in London. She had the prospect of far better housing on the money that she had, whilst the evidence of her mother's ill health was compelling.

[158] Miss Ford on behalf of the guardian quoted from remarks made by the mother were she not able to move to the USA. She would be 'totally devastated, extremely resentful, angry. My mother needs my support and it is my right and gift to be there for her. To deny me that would be extremely cruel. My application for leave is genuine'.

[159] The guardian's final conclusion was that the question for her was the solution which would be least damaging for P. Neither parent had provided one which was ideal. The mother's was to be preferred for P's benefit.

*Conclusions*

[160] These applications have caused me considerable anxiety from the time of my initial involvement. It was only when I considered the evidence of Dr Berelowitz and the guardian, 'the experts', which I accept, that my earlier views became confirmed to an extent that I am not now in doubt. Neither P staying here with his mother or living with her in the US is without difficulties. But I am strongly persuaded that the better course in his best interests is for me to give the mother permission to relocate to New Mexico. However there should be conditions attached to which I shall come.

[161] I start by considering the father's applications. A sole residence order in favour of the father is out of the question for the reasons relied upon by Dr Berelowitz. The mother has always been his prime carer. There are no concerns about her day-to-day care. The father, save for P's emotional needs, considers her an excellent mother. All other reports confirm this.

[162] There are none of the serious concerns about the mother's care which would be warranted if a change is to be made. That would include the mother believing that P had been sexually abused by his father. As she explained in her evidence and foreshadowed in her last statement, she has moved on from that as I accept.

[163] A fundamental part of the hearing is whether the mother's present views represent a genuine change of view or whether she is merely saying what she perceives will assist her case. Given the strength of her wish to move with P to the USA, there has to be considerable worry about whether I can accept as genuine what the mother now sets out as her position. I have been very conscious of this during the hearing.

[164] It is against the background of her initial accusations of sexual abuse with its massive results for the father, her flight to the USA with P in breach of a court order, and her strong opposition to any contact thereafter. That, her hostility to the father whether for good reasons or not, and her undoubted wish to go to the USA are powerful factors.

[165] These considerations, the contrasting presentations of each party, and their different sexual orientation add to the difficulties on this fundamental point. The father's desperate wish to play a major part in P's life, and his no less strong belief that all will be lost if P goes to the USA are as clear from his evidence as they are from his manner. His strong emotions are readily evident in all he says – it is no criticism to say that he wears his heart on his sleeve. His wish to share P with the mother is genuine and heartfelt.

[166] The mother has strong emotions but they are far less evident. She had strong motivation to have a child and she has proved to be a caring and able mother. The tangle of emotions to which the original plan gave rise was not anticipated by her. She has been deeply hurt by the father's attitude and the break up of her relationship with L.

[167] Having heard each parent give evidence, I conclude that the mother has been able to move on. She finds contact and conversation with the father difficult but she has accepted the value of contact and of the father's role in P's life. It has been difficult but she has listened to advice. The father, who has had to battle to establish any relationship with P, has shown great commitment and determination. He has not spared the legal expense. He has been twice arrested for alleged sexual abuse. Contact was interrupted for over a year. Just

as contact was at last progressing well, the mother applies to remove P to the USA, a bitter blow which the father has fought hard to resist.

[168] He has listened to advice on the level of contact for which he should aim. But he is still emotionally embittered by all that has happened, remains unrealistic about the future for him, the mother and P here, and has not moved on to anything like the same extent as the mother.

[169] I have concluded that the mother is genuine in relation to her view of the former allegations of sexual abuse, and her declaration that she will not raise those allegations again, nor denigrate the father. She has accepted the role that the father has in P's life. I have taken time to reach that opinion given the history and the obvious advantage to the mother in saying this. I have found considerable support from the experts who have expressed similar views. They have seen and spoken to the mother over a number of years and at a time when she was expressing very different views.

[170] There is therefore no proper basis in P's best interests on which I could consider a change of residence from the mother to the father. I turn to shared residence. The prospect of this working when the parties cannot talk to each other is very low indeed. It gives rise to all the problems to which Dr Berelowitz drew attention. An analysis, even if possible, of which parent is mainly to blame does not add to this. I accept the guardian's view that both are at fault.

[171] The seeds of this disastrous situation were sown before P was born. The agreement between all three of them was that the father was to play the role of an uncle. No one had anticipated the strong emotional effect on the father of having a son. He was unable to keep to the agreement. That had a significance which became far more profound. It involved his sister and her relationship with the mother.

[172] His assertion of a paternal role, whilst most understandable, threatened their plans to be joint parents, and in the end was a major factor in the termination of their relationship. It is no surprise with the father's new found role, the accusations made against him and the battle to establish contact on the one hand, and the mother's upset at his aggressive and threatening behaviour and the effect on her relationship with L, that there should be lasting conflict.

[173] That conflict does not permit of a shared residence order at this time and prevents or substantially reduces the prospect of a developing role for the father here. The adverse effect on P who has already been affected is too serious. The unanimous opinion of the experts is so well founded that it cannot be ignored; it is ultimately decisive. But this does not address the mother's application in the form which Thorpe LJ put forward in *Payne v Payne* [2001] EWCA Civ 166, [2001] Fam 473, [2001] 1 FLR 1052.

[174] I consider firstly the genuineness of the mother's application. This has two parts. The first is the motivation, the second is the practicality.

[175] I find that the two major factors behind the mother's application are employment and her mother's health. If she had been able to find employment here comparable to that which she formerly enjoyed, she would have taken it. The prospects were always bleak and remain so. There is the length of time she has been out of the employment market and the difficulty with overruns and postponements in fitting in her need to look after P. That is however only part of it. The competition is exceptionally strong in the UK. She has made

repeated and genuine efforts to find comparable employment. This has been sustained over a period of more than a year.

[176] Even if she had been successful the decline in her mother's health would have presented major problems. She has lived in the USA for many years. She has friends in Miami where she is at present and in Santa Fe. It is not reasonable to suggest she should move to the UK. It has not been suggested. It is also not practical when the mother has no employment here and the insurance cover for her mother to live in assisted housing which is needed would not help here.

[177] The offer of suitable employment in Santa Fe I have looked at with care. I see no reason to doubt it is genuine. It is in the field in which the mother wants above all to work in. It offers flexible employment and provides health insurance. It is a city where the mother has friends, two particularly close at a time when she has no family and little other support here.

[178] She has taken sensible steps to research her position with P. With £300,000 even without a mortgage which she can readily afford, she can obtain far better accommodation than in London. She has investigated schools. She has chosen a private one she considers particularly appropriate for P. I am, therefore, satisfied that there is a genuine motivation to move which is also practical in terms of employment, home, support, school, health, and is in a known environment.

[179] Is there nevertheless a selfish desire to exclude the father? Given the history of the last 4 years and the continuing difficulties (for instance with the bruising), it would be too much to believe that the mother would other than welcome relief from the strain of the present state of affairs. I have nevertheless come to the clear conclusion that whilst that factor is likely to be present, far stronger motivation has been provided by the offer of employment and her deep desire to help her mother and to be with her.

[180] I have then looked at the father's opposition. He sees the long struggle at heavy cost of achieving the present level of contact. His good relationship with P is accepted. He is obviously good with children. All that he considers will come to an end if the mother's application is granted. He cannot continue a valuable relationship with P at a distance of 5,000 miles even if he felt able to visit. He could not afford the visits other than occasionally if he was to take someone else as a protection. His upset at the prospect was so great that he had difficulty in contemplating seeing P even if the mother brought him here.

[181] With the mother now offering staying contact the move contemplated would have an even greater significant effect on his relationship with P. It is a genuine concern that drives the father. P has played a part in his life more profound than even he originally suspected. Any upset to the development of the relationship will cause him considerable upset. He will undoubtedly feel bereft but he argues P will also be the loser as it cannot be in his best interests.

[182] It is his case that the relationship cannot develop at the same rate nor have the same advantage for P which would happen if his parents were both living here and there was regular contact with P. Even if the father took up what I accept is the generous contact offered by the mother, the time between visits and the distance would, he believes, finish or at least slow down a valuable and developing relationship for P and be contrary to his best interests.

[183] It is an attractive and compelling argument on first consideration. But it overlooks two major factors to which I now come and to which the father has not given sufficient thought or understanding.

[184] The first is the impact on the mother were she not able to go. It would be dramatic and long lasting. All the devastation for her as summarised by Miss Ford are, I find, genuine and deeply felt. She would have no career to look forward to in her chosen profession and I see no prospect of that changing. She would deeply resent being cut off from her mother when she is so needed. She would be living in a far less desirable home than either she had here or she could provide in the USA.

[185] It is idle to believe that this would not affect her care of P. Her frustration and despair would be profound. She would see herself as condemned to remain here without work of her choice solely for the purpose of contact whilst longing to be with her mother in her remaining years. If she succumbed to depression that would not be surprising especially with a continuation of the present level of acrimony with the father as has been rightly predicted. That is a very powerful factor in this case and one of the decisive elements.

[186] But when all these factors are brought into an overview of P's welfare, even if they were not sufficiently clear on their own to justify a relocation for P's benefit (which I consider them to be), there is also the effect on P of the present conflictual situation continuing. I have been totally persuaded by the experts of the increasing harm that will be caused emotionally and psychologically for P. I have set out the details. I accept their professional view. It is not something I can ignore. It is again a decisive element.

[187] There is therefore a genuine and strongly reasoned application by the mother to relocate P to the USA at a time when I rule out a residence order to the father or at this time a joint residence order. It is also a practical application. The guardian considers that the mother does have P's best interests at heart. After due reflection I agree. It is no less genuinely opposed by the father for good reason as he sees it. However the effect on the mother would be as serious as I have encountered in any similar case.

[188] However, even if there were any lingering doubts, they would be wholly removed by the seriously negative effect on P of the present situation continuing, which I see again with the expert, has no sign of improving. Given the difficulty for the father in moving on, the intensity of the conflict will remain and be increasingly damaging for P. That outweighs any reduction in the amount and the quality of the father's relationship with him.

[189] It was a consideration of all these factors which enabled me to give a decision at the end of the case. But it does not end there. I said I would impose conditions. Before I turn to them, I add some further conclusions.

[190] The father believes that with the mother compelled to stay here their relationship will improve. With the experts I reject that and believe as they do that the only real prospect for improvement is for the mother to be in the US with P for the reasons they give. This includes the reduction in pressure and the stability which will be achieved. The alternative of the mother remaining here without employment in her chosen profession whilst P becomes more damaged by the continuing conflict is far too great a price for P to pay.

[191] Once the father has begun to come to terms with his disappointment and with effective safeguards in place, I consider he will soon for P's sake

visit him in the USA. This is, I find, the best and only hope for the developing relationship which the father most wants.

[192] He will retain a good relationship with him in the USA supported by regular indirect contact. It will not be as good as regular staying contact here if that could be achieved without the continuing conflict. He has already experienced contact with P in the USA. With advantage of cheap air flights he can afford visits if not every 5 weeks at least once every 6 to 8 weeks once it is clear no companion is needed.

[193] With renewed confidence and P's increasing age the father can progress to longer stays both here and in the US. He will not, I believe, decline these opportunities when he sees its value for P and the pleasure for him. It is because I see with the experts almost no prospect of an absence of conflict here that has led me with my other conclusions to accept the mother's proposals as representing the best chance for the father because it will be the least damaging option for P.

[194] The father has fought valiantly and with the added disadvantage of no representation. I have endeavoured to ensure every point has been put on his behalf. Given the quality and clarity of the expert evidence, I see no prospect of any other conclusion despite the father's great upset. It is unrealistic to think there is any prospect of a sudden or gradual improvement here of his relationship with the mother.

[195] He has not come to terms with the mother's position nor lessened his overriding view that she really wishes him out of P's life. He has had to endure arrests, disruption to contact and the loss of almost all his resources; it is perhaps understandable that he should view the mother as coaching P. But it underlines why continuing contact here will be fraught with difficulties when each party has by now almost exhausted their emotional strength.

[196] The mother has progressed; sadly it has as yet been too difficult for the father. I am optimistic that this will improve but not whilst P remains in the UK. In the light of the expert's evidence and the telling submissions of Miss Dodson QC and Miss Ford, the real hope for the father's valuable relationship with P is for the mother to move when the pressure for her will be greatly reduced. Her state were she to remain, and the effect on P of both that and continuing acrimony are not in his best interests.

[197] I have looked short, medium and long-term. The short-term upset for P of seeing less of his father is heavily outweighed by the prospects for the future with his mother in employment and, as I find, a substantial reduction in acrimony.

#### *Conditions*

[198] There are three conditions in all. The first relates to mirror orders and appropriate undertakings. As the father is not represented I am going to ask the mother's advocate to prepare a draft of what the mother is prepared to offer for the father to consider and on which I can adjudicate.

[199] The second relates to the parents beginning the task of communicating with each other. I regard this as very desirable. The guardian kindly offered to assist at meetings between them. I await the results.

[200] Finally there is the fund of money represented by the mother's interest in her present flat. The father needs to be reassured that the contact offered will be honoured, and that he can visit and leave Santa Fe without fear of

further accusations nor the need to be accompanied. This is so important for P that if a safeguard will promote such visits it should be provided.

[201] What I propose is that the greater part of the proceeds of sale should be held to the order of the court for an initial period to be extended or terminated as required. The percentage to be retained and the length of time have not been the subject of argument. It may well delay the mother purchasing her own property. She may have to rent for longer. But, subject to any argument to the contrary, that should not be too much if it provides the father with added reassurance given the history.

[202] This matter must now be restored for further hearing before the end of term. I should be grateful to have draft orders for consideration beforehand.

*Order accordingly.*

Solicitors: *Dawson Cornwell Solicitors* for the first respondent  
*Aitken Associates Solicitors* for the second respondent

CAROLINE BRIDGE